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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Martin Dominguez, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

Lowe's Companies, Inc, a Delaware
Corporation, and Salesforce, Inc., a
Delaware Corporation.

Defendants.

Case No.

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

1 Plaintiff Martin Dominguez, individually and on behalf of all others similarly
2 situated as set forth herein, alleges as follows:

3 **NATURE OF THE ACTION**

4 1. Defendants embedded spy tracking pixels in marketing emails Defendants
5 sent to Plaintiff and other Arizona residents who subscribed to Lowe's Companies, Inc.'s
6 email list.

7 2. A.R.S. § 44-1376 *et seq.* prohibits procurement of any "communication
8 service record" (including email records) of "any resident of this state without the
9 authorization of the customer to whom the record pertains, or by fraudulent, deceptive,
10 or false means." A.R.S. § 44-1376.01.

11 3. Defendant Lowe's Companies, Inc. ("Lowe's") utilized the hidden
12 embedded tracking system provided by Defendant Salesforce, Inc. ("Salesforce") to
13 collect, obtain and track, among other things, the time and place where Plaintiff and other
14 Arizona residents opened the email, the average read time of an email, the amount of
15 times an email was opened, whether an email was printed, whether an email was
16 forwarded, and how long the recipient looked at the email, the device the recipient used
17 to look at the email and even if and where you clicked within an email.

18 4. Salesforce's hidden embedded email tracking pixels are used by Lowe's
19 and monitor Plaintiff and other Arizona residents' behavior.

20 5. Salesforce obtains, stores and uses the collected data and communication
21 service records to paint a uniquely identifiable detailed picture of Plaintiff and other
22 Arizona residents' interests to create targeted advertising campaigns for Lowe's.

23 6. Lowe's also obtains, stores and uses the collected data and communication
24 service records to paint a uniquely identifiable detailed picture of Plaintiff and other
25 Arizona residents' interests to create targeted advertising campaigns for Lowe's.

26 7. This is a class action lawsuit brought on behalf of Arizona residents.
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1 2018 Princeton study on email tracking tested over 12,000 emails from 900 senders
2 offering mailing list subscriptions and found that 70% contained trackers.”¹

3 25. These trackers are known as “spy pixels.”

4 26. A spy pixel is typically a 1x1 (one pixel high by one pixel long) image.
5 “The spy pixel is so small it is basically impossible to see with the naked eye.”²

6 27. A spy pixel is deliberately made small and impossible to spot with the
7 naked eye even if a person knows where to look.

8 28. An email spy pixel is a tiny pixel graphic used to measure various metrics
9 while gathering information about email recipients.

10 29. The minuscule size of a spy pixel makes it almost invisible and enables it
11 to blend in with the background of an email. This is intentional, as tracking pixels (i.e.,
12 spy pixels) are designed to go unseen.

13 30. The objective of a spy pixel is to collect information without the knowledge
14 of the recipient of the email.

15 31. The spying effect is that, without the email recipient choosing to do so, the
16 result of opening the email is to report to the sender of the email: if and when an email is
17 read, when (and how many times) it is read, the IP address and other unique identity
18 details of the computer or smartphone used to read the email, and from the latter, the
19 geographical location of the recipient.
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22
23 ¹ Mikael Berner, *The Business of Email Tracking: What To Know About Spy Pixels In Your*
24 *Inbox*, FORBES (Jun 9, 2022), [https://www.forbes.com/sites/forbestechcouncil/2022/06/09/the-](https://www.forbes.com/sites/forbestechcouncil/2022/06/09/the-business-of-email-tracking-what-to-know-about-spy-pixels-in-your-inbox/?sh=2084ee793fec)
25 [business-of-email-tracking-what-to-know-](https://www.forbes.com/sites/forbestechcouncil/2022/06/09/the-business-of-email-tracking-what-to-know-about-spy-pixels-in-your-inbox/?sh=2084ee793fec) about-spy-pixels-in-your-inbox/?sh=2084ee793fec.

26 ² Becky Willeke, *Spy pixels are hiding in your emails; so what can you do about it?*, FOX 2
27 NOW (Mar. 15, 2021), [https://fox2now.com/news/tech-talk/spy-pixels-are-hiding-in-your-](https://fox2now.com/news/tech-talk/spy-pixels-are-hiding-in-your-emails-so-what-can-you-do-about-it/)
28 [emails-so-what-can-you-do-about-it/](https://fox2now.com/news/tech-talk/spy-pixels-are-hiding-in-your-emails-so-what-can-you-do-about-it/).

1 32. To activate a spy pixel, recipients need only to open the email.

2 **B. Defendants' Spy Pixel Tracking**

3 33. In 2013, Defendant Salesforce acquired the customer engagement and
4 email tracking company ExactTarget.

5 34. Salesforce renamed ExactTarget as Salesforce Marketing Cloud after
6 Salesforce acquired ExactTarget.

7 35. Salesforce Marketing Cloud provides digital marketing automation and
8 analytics software and services for email, mobile, social and online marketing.

9 36. Among other things, Salesforce Marking Cloud offers companies like
10 Lowe's the service and product of embedding marketing emails with nearly invisible
11 pixels, not transparent to the naked eye, which tracks the consumer and their activities on
12 their own personal computer or mobile device.

13 37. The Salesforce Marketing Cloud's tracking feature uses a 1x1 pixel to track
14 information.

15 38. As part of the tracking, the pixel obtains and collects details about the
16 consumer at home or on their mobile device, such as the consumer's location, the time a
17 message was opened, the time links were clicked, and whether an email was shared with
18 a family member or acquaintance.

19 39. As part of the tracking, the pixel obtains and collects information about the
20 consumer's device, and whether it is a computer or mobile device.

21 40. This tracking pixel enables Defendants to track "engagement data" for
22 every email recipient on an individual level.

23 41. Defendants collect, obtain, store, record and use the engagement data and
24 communication service records.

25 42. The Salesforce database contains the collected and obtained information
26 which is then used to generate data for leads, tasks, opportunities and accounts.
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1 43. Salesforce can and does link the collected information about the consumer
2 with additional data about the consumer that Salesforce possesses and/or purchases from
3 third parties including third party data brokers.

4 44. Salesforce maintains the collected data and information and makes it
5 available to Lowe's for export or download.

6 45. This tracking pixel can be seen in a snippet of the HTML code in one of
7 Defendant Lowe's emails:

8
9 <img width=3D"1" height=3D"1" src=3D"https://pixel.inbox.exacttarget.com/pi=
10 xel.gif?r=3D3cee957cf4045be5bdd97f3d45b56bc1d2d850ec">
11 <img width=3D"1" height=3D"1" alt=3D"" src=3D"https://click.e.lowes.com/ope=
12 n.aspx?ffcb10-fed0107075640278-fe4f1175716d077a7d13-fe9515707364027471-ff9d=
13 1670-fe5f1671706d007f7c14-feffc1077746403& ;d=3D40139& ;bmt=3D0">

14 46. Defendants embedded a spy pixel (one pixel high by one pixel long) in
15 marketing emails Defendant Lowe's sent to Plaintiff and Defendants utilized the tracking
16 system provided by Salesforce to track, among other things, the time and place of where
17 the emails were opened.

18 47. Plaintiff was unaware that tracking pixels were embedded in the emails sent
19 to him by Defendants.

20 48. Defendant Lowe's never received consent from Plaintiff to use tracking
21 pixels.

22 49. Defendant Lowe's never received consent from Class Members to use
23 tracking pixels.

24 50. Defendant Salesforce never received consent from Plaintiff to use these
25 tracking pixels.

26 51. Defendant Salesforce never received consent from Class Members to use
27 tracking pixels.
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Arizona’s Telephone, Utility and Communication Service Records Act
A.R.S. § 44-1376

52. A.R.S. § 44-1376 *et seq.* prohibits procurement of any “communication service record” (including email records) of “any resident of this state without the authorization of the customer to whom the record pertains, or by fraudulent, deceptive, or false means.” A.R.S. § 44-1376.01.

53. A.R.S. § 44-1376 (1) defines “communication service record” as follows: “‘Communication service record’ includes subscriber information, including name, billing or installation address, length of service, payment method, telephone number, electronic account identification and associated screen names, toll bills or access logs, records of the path of an electronic communication between the point of origin and the point of delivery and the nature of the communication service provided, such as caller identification, automatic number identification, voice mail, electronic mail, paging or other service features. Communication service records do not include the content of any stored oral, wire or electronic communication or a telephone record.”

54. A.R.S. 44-1376.04(A)(2) allows Arizona residents to pursue civil causes of action and civil remedies. Ariz. Rev. Stat. Ann. § 44-1376.04(A)(2).

55. A.R.S. 44-1376.04(A)(2) states that “[i]n a civil action, a customer whose communication service records were procured, sold or received in violation of this article may recover from the person that committed the violation the following relief...2. Damages equal to the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation but in no case shall a person entitled to recover received less than one thousand dollars.”

Class Action Allegations

56. Plaintiff seeks to represent a class (the “Class” or “Class Members”) defined as: All persons in the State of Arizona who have opened a marketing email

1 containing a tracking pixel from Defendants during the two years preceding the filing of
2 this Complaint.

3 57. Excluded from the Class are Defendants, its subsidiaries, affiliates, officers,
4 directors, assigns and successors, and any entity in which it has a controlling interest, and
5 the Judge to whom this case is assigned and any member of his or her immediate family.

6 58. Class Members are so numerous that their individual joinder herein is
7 impracticable. On information and belief, members of the Class number in the tens of
8 thousands and possibly more. The precise number of Class Members and their identities
9 are unknown to Plaintiff at this time but will be determined through discovery.

10 59. Class Members may be notified of the pendency of this action by email,
11 mail and/or publication through the distribution records of Defendants and third-party
12 retailers and vendors.

13 60. Common questions of law and fact exist as to all Class members and
14 predominate over questions affecting only individual Class members. Common legal and
15 factual questions include, but are not limited to:

16 a) whether Defendants “[k]nowingly procure[d], attempt[ed] to procure,
17 solicit[ed] or conspire[d] with another to procure a ... communication service
18 record of any resident of this state without the authorization of the customer to
19 whom the record pertains or by fraudulent, deceptive or false means” ;

20 b) whether Plaintiff’s and the Class’s “communication service records” were
21 procured, sold or received in violation of A.R.S. § 44-1376 *et seq.*

22 c) whether Defendants’ conduct violates A.R.S. § 44-1376 *et seq.* or any other
23 applicable laws; and

24 d) whether, as a result of Defendants’ misconduct as alleged herein, Plaintiff
25 and Class Members are entitled to restitution, injunctive, and/or monetary relief
26 and, if so, the amount and nature of such relief.
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1 61. Plaintiff's claims are typical of the claims of Class Members because
2 Plaintiff, like all Class Members, had his communication service records procured, sold,
3 or received by Defendants.

4 62. Plaintiff is an adequate representative of the Class because his interests do
5 not conflict with the interests of the Class he seeks to represent, he has retained counsel
6 competent and experienced in prosecuting class actions, and he intends to prosecute this
7 action vigorously. The interests of Class Members will be fairly and adequately protected
8 by Plaintiff and his counsel.

9 63. The class mechanism is superior to other available means for the fair and
10 efficient adjudication of the claims of Plaintiff and Class Members. Each individual Class
11 Member may lack the resources to undergo the burden and expense of individual
12 prosecution of the complex and extensive litigation necessary to establish Defendants'
13 liability.

14 64. Individualized litigation increases the delay and expense to all parties and
15 multiplies the burden on the judicial system presented by the complex legal and factual
16 issues of this case.

17 65. Individualized litigation also presents a potential for inconsistent or
18 contradictory judgments. In contrast, the class action device presents far fewer
19 management difficulties and provides the benefits of single adjudication, economy of
20 scale, and comprehensive supervision by a single court on the issue of Defendants'
21 liability.

22 66. Class treatment of the liability issues will ensure that all claims and
23 claimants are before this Court for consistent adjudication of the liability issues.

24 67. Plaintiff brings this claim individually and on behalf of the proposed Class
25 against Defendants.

26 68. Defendants embed spy pixels in their marketing emails sent to Plaintiff and
27 Class Members.
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1 75. Plaintiff and Class Members never gave lawful consent to Defendants to
2 procure the communication service records.

3 76. As set forth herein, Defendants obtained the data and communication
4 service records by deceptive means.

5 77. Each time Defendants sent an email containing a spy pixel to Plaintiff and
6 Class Members, Defendants procured a communication service record, thus committing
7 a separate violation of A.R.S. § 44-1376.01.

8 78. Defendants invaded Plaintiff's and Class Members' right to privacy by
9 spying on them when they opened and read an email. That conduct also intruded upon
10 their seclusion.

11 79. Accordingly, Plaintiff, individually and on behalf of the proposed Class,
12 prays for the relief set forth by the statute, including actual damages, profits made by
13 Defendants as a result of the violation, \$1,000 for each violation, reasonable attorneys'
14 fees and other litigation costs reasonably incurred, and such other equitable relief as the
15 court determines to be appropriate.
16

17 **WHEREFORE**, Plaintiff, individually and on behalf of all others similarly
18 situated, seeks judgement against Defendants, as follows:

- 19 a. For an order certifying the Class under Fed. R. Civ. P 23 and naming
20 Plaintiff as representative of the Class and Plaintiff's attorneys as Class
21 Counsel to represent the Class Members;
- 22 b. For an order declaring that Defendants' conduct, as set out above,
23 violates A.R.S. § 44- 1376.01;
- 24 c. For an order finding in favor of Plaintiff and the Class on all counts
25 asserted herein;
- 26 d. For actual damages or damages of \$1,000.00 for each of Defendants'
27 violations, whichever is more, pursuant to A.R.S. § 44-1376.04;
- 28 e. For damages equal to the sum of any profits Defendants made for each
of Defendants' violations, pursuant to A.R.S. § 44-1376.04;

- 1 f. For injunctive and other equitable relief as is necessary to protect the
2 interests of the Class, including, *inter alia*, an order requiring
3 Defendants to comply with A.R.S. § 44-1376 *et seq.*
- 4 g. For an order awarding Plaintiff and the Class their reasonable attorneys’
5 fees and expenses and costs of suit;
- 6 h. For pre- and post-judgment interest on all amounts awarded, to the
7 extent allowable; and
- 8 i. For such other and further relief as the Court may deem proper.

9 **Jury Demand**

10 Plaintiff demands a trial by jury on all causes of action and issues so triable.

11
12 Dated: May 5, 2024

Respectfully submitted,

13 Martin Dominguez, individually and on behalf
14 of a class of persons similarly situated.

15 /s/ James X. Bormes

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